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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY VALDEZ, Defendant and Appellant.	B285712, B292559 (Los Angeles County Super. Ct. No. LA081895)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas Rubinson, Judge. Affirmed and remanded on sentencing.

Brian C. McComas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David A.

Wildman, Deputy Attorney General, for Plaintiff and Respondent.

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Anthony Valdez (defendant) appeals from his conviction of voluntary manslaughter and his ensuing 27-year prison sentence. On appeal, defendant argues that the trial court erred in (1) denying his *Batson/Wheeler* challenge, and (2) not giving two jury instructions that he never requested. In an accompanying petition for a writ of habeas corpus, defendant argues that his trial counsel was constitutionally ineffective for not requesting the jury instructions and for not investigating and introducing evidence relevant to those instructions.[1] We conclude there is no reversible error, affirm his conviction and deny the petition. However, in light of Senate Bill 1393, defendant is entitled to a remand for the trial court to decide whether to exercise its newfound discretion to strike one of the sentencing enhancements.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

After midnight on September 29, 2015, defendant plunged a knife into Jari Wayne's chest, perforating his heart and causing Wayne to die from internal bleeding.

The stabbing was caught on video.

Wayne walked into a strip mall's laundromat and came back out into the mall's parking lot a few minutes later with defendant. Defendant was the first to exit the laundromat, and he walked with his right arm down at his side and a metallic

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1 We previously ordered that the petition will be considered concurrently with this appeal.

object in his right hand. Wayne followed, staggering behind defendant but attempting to catch up with him. Wayne's blood alcohol content was more than twice the legal limit, and he also had marijuana in his system. Wayne then removed his shirt. Immediately thereafter, defendant stuck Wayne in the chest with his right hand. As Wayne lurched from the blow, defendant went back into the laundromat for a moment before getting on a bicycle and riding off.

After he was arrested, defendant called a friend from jail and told him, "it's not self-defense when I have a weapon and he doesn't."

II. Procedural Background

The People charged defendant with first degree murder (Pen. Code, § 187).[2] The People alleged that defendant personally used a deadly and dangerous weapon—that is, a knife (§ 12022, subd. (b)(1)). The People further alleged that defendant's 2004 conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) constituted a "strike" within the meaning of our Three Strikes Law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)) as well as a "prior serious felony" (§ 667, subd. (a)(1)).[3]

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2 All further statutory references are to the Penal Code unless otherwise indicated.

3 The People also charged defendant with assault with a deadly weapon for an incident involving a different victim a few days earlier and also alleged that defendant's 1998 assault with a deadly weapon juvenile adjudication constituted a "strike." The trial court dismissed the other charge after the People announced they were unable to proceed, and the People did not re-allege the 1998 assault in the operative information.

The matter proceeded to a jury trial. The trial court instructed the jury on first degree murder, the lesser included offense of voluntary manslaughter (based on imperfect self-defense), and the defense of self-defense.

The jury convicted defendant of voluntary manslaughter and found the personal use allegation true. The trial court subsequently found the prior conviction allegation to be true.

The trial court sentenced defendant to 27 years in state prison. In calculating this sentence, the court imposed 22 years for the voluntary manslaughter count (comprised of a high-end sentence of 11 years, doubled due to the prior strike) plus five years for the prior serious felony. The court stayed the dangerous weapon enhancement.

Defendant filed this timely appeal.

DISCUSSION

Direct Appeal

I. *Batson/Wheeler* Challenge

Defendant argues that the trial court erred in overruling his objection that the prosecutor's use of a peremptory strike against Juror No. 23 violated *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We independently review the trial court's ruling. (*People v. Harris* (2013) 57 Cal.4th 804, 834.)

A. *Pertinent facts*

Defendant is Hispanic. The prospective pool of jurors was "heavily" Hispanic.

After 60 prospective jurors were questioned by the trial court, defendant's attorney and the prosecutor, the court removed three jurors for cause and the parties stipulated to excuse a fourth juror. The parties then began to exercise their peremptory

challenges. The prosecutor exercised eight challenges before accepting the panel. When the court was forced to excuse two jurors from the accepted (but not yet sworn) panel, jury selection resumed, and the prosecutor struck a ninth juror.

Defendant at that point made a *Batson*/*Wheeler* objection.

The trial court noted that six of the prosecutor's nine peremptory challenges had been exercised against prospective jurors who "appear to be of Hispanic or Latino ethnicity," and ruled that "the sheer numbers . . . constitute[d] a prima face case of discriminatory purpose."

The court then asked the prosecutor to offer his reasons for excusing the six Hispanic jurors—Juror Nos. 2, 10, 19, 23, 28, and 37. The prosecutor explained that he excused the first three jurors (Juror Nos. 2, 10 and 19) due to their "language issues." The prosecutor explained that he excused Juror No. 28 because he had expressed a negative view of law enforcement, as shown by his "statement about law enforcement taking advantage of their badge or title." The prosecutor explained that he excused Juror No. 37 because he "made a statement during voir dire that he would vote not guilty based on how calm he perceived the defendant to be during the proceedings." And the two prosecutors explained that they excused Juror No. 23 because that juror (1) "made a statement regarding a fight that occurred that involved a knife" and stated that "he ran" from the fight, and thus potentially raised "a self-defense issue" similar to the one at issue in this case; (2) indicated that the fight "involved gang members," and evidence of defendant's gang membership—while excluded from the People's case-in-chief—could still come into evidence should defendant testify; (3) did not "speak up" when the trial court asked the prospective jurors a general question

"about violence"; and (4) was young, had no kids, and was not a professional, and was thus not "view[ed] generally as [a] pro-prosecution juror[]."

The trial court upheld each of the strikes as "legitimate" and overruled the *Batson/Wheeler* objection. As a general matter, the court noted that the record supported the prosecutor's stated reasons. And specifically as to Juror No. 23, the record indicated that (1) Juror No. 23 did not speak up when the court had asked the pool of prospective jurors whether "you or anyone very close to you [had] . . . ever been the victim of a crime of violence"; and (2) Juror No. 23, in response to the defense attorney's question about whether "you[] . . . or someone you know, has ever been in a physical altercation," answered that he "had . . . an incident . . about [five] years ago[, while] playing . . . a soccer game . . . against . . . a couple of gang members, and . . . we ended up getting in a physical fight with them, and . . . one of them ended up stabbing one of our players, and then . . . everyone just scattered away." The court also engaged in comparative analysis of whether the prosecutor had retained other non-Hispanic jurors similar to Juror No. 23, and found no juror "who had the same kind of or even really close to the same kind of experiences as [Juror] No. 23 had" been retained. The court also noted that the jury had at least three jurors of Hispanic ethnicity when the prosecutor had accepted the panel.

B. *Analysis*

Although a prosecutor may exercise a peremptory challenge to strike a prospective juror "'for any reason, or no reason at all' [citation]" (*People v. Scott* (2015) 61 Cal.4th 363, 387 (*Scott*)), he or she may not use a peremptory challenge to "'strike prospective jurors on the basis of group bias—that is, bias against "members

of an identifiable group distinguished on racial, religious, ethnic or similar grounds" . . ." (*People v. Bell* (2007) 40 Cal.4th 582, 596.) Doing so violates a defendant's federal right to equal protection set forth in *Batson*, *supra*, 476 U.S. 79, and his state right to a trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution set forth in *Wheeler*, *supra*, 22 Cal.3d at p. 272. (Accord*, People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157 (*Gutierrez*).)

Although a defendant bears the ultimate burden of showing a constitutional violation (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613), trial courts employ a three-step, burden-shifting mechanism in assessing whether a *Batson/Wheeler* violation has occurred. The defendant must first "make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges." (*Scott*, *supra*, 61 Cal.4th at p. 383.) If the court finds that the defendant has established this prima facie case, the prosecutor must then "explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. (*Ibid.*) The court must finally make a "'sincere and reasoned effort to evaluate . . . the nondiscriminatory justifications'" (*People v. Williams* (2013) 56 Cal.4th 630, 650), and "decide whether" the prosecutor's proffered reasons are subjectively genuine or instead a pretext for discrimination. (*Scott*, *supra*, 61 Cal.4th at p. 383; *People v. Duff* (2014) 58 Cal.4th 527, 548; *People v. Jones* (2013) 57 Cal.4th 899, 917.)

Because the trial court found that defendant had established a "prima facie" case of discrimination and asked the prosecution its reasons for excusing the six Hispanic jurors, the

propriety of the trial court's *Batson/Wheeler* ruling turns on whether the court erred in finding that the prosecution's reasons for excusing Juror No. 23—the only excusal defendant challenges on appeal—were "subjectively genuine."

We independently conclude that they were. The prosecution cited four reasons for excusing Juror No. 23—his involvement in a knife fight similar to the charged offense where self-defense was arguably at issue, his familiarity with gangs (as shown by his willingness to play team sports against them), his failure to speak up when asked whether "anyone very close" to him had been a victim of a crime of violence when one of his teammates had been stabbed, and his youth, parental and marital status and profession. Each of these is a legitimate, non-discriminatory basis to excuse a juror. (See *People v. Cox* (2010) 187 Cal.App.4th 337, 356 ["familiarity with gangs" is "race-neutral"]; *People v. Williams* (1997) 16 Cal.4th 153, 191 [same]; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 509 [juror's lack of "forthright[ness]" is legitimate]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 ["[l]imited life experience is a race-neutral explanation"]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [profession is race neutral].)

Defendant offers what boil down to five reasons why the trial court erred in rejecting his *Batson/Wheeler* challenge.

First, he argues that the prosecution's reasons for excusing Juror No. 23 were not sincere because (1) the first prosecutor misstated Juror No. 23's answers (because, in defendant's view, Juror No. 23 never said he was involved in the fight at the soccer game and never said he "socialized" with gang members); (2) both prosecutors relied in part on Juror No. 23's interaction with gang members, but the court had excluded all gang evidence; and (3)

the prosecution gave some of its reasons (those dealing with the soccer game) initially and proffered additional reasons (those dealing with the failure to answer a question and Juror No. 23's job and life experience) only after the court asked for further reasons. None of these arguments calls into question the prosecutors' sincerity. The first prosecutor did not misstate Juror No. 23's answers: The juror said, "*we* ended up getting in a physical fight," which supports the view that he was more than a spectator, and the juror's willingness to play soccer against "gang members" supports the view that he was "socializing" with them. The prosecutor candidly acknowledged that gang evidence would not be coming in as part of their case-in-chief, but correctly noted that the court might revisit that ruling if defendant chose to testify. And the prosecution's decision to provide additional reasons at the court's request does not call into question the legitimacy of the reasons that came before or after the request, at least where they are supported by the record and consistent with one another.

Second, defendant contends that comparative juror analysis shows that the prosecutor was singling out Juror No. 23 due to his ethnicity. In particular, defendant notes that the prosecutor (1) did not strike Juror Nos. 33 and 40 even though they were involved in violence, (2) did not strike Juror Nos. 3, 13, and 40[4] even though they were young or not professionals, and (3) struck Juror Nos. 30, 37 and 47 even though they were professionals. A prosecutor's failure to exercise peremptory strikes using consistent criteria can reveal an ulterior, race-based motive, but only if the "challenged panelist . . . [is] similarly,"

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4 Defendant also cites Juror No. 8, but the defense struck that juror.

although not identically, "situated [to the] unchallenged panelists who are not members of the challenged panelist's protected group." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1173.) None of the jurors defendant points to—Juror Nos. 3, 13, 30, 33, 37, 40, or 47—was involved in a fight with gang members where a knife was pulled, someone was stabbed, and the juror fled. And Juror Nos. 33 and 40 were not personally involved in any violence: Juror No. 33's grandson was in a car with gang members when the driver shot two people, and Juror No. 40's father was killed by a drunk driver decades earlier. In sum, the differential treatment of these jurors by the prosecution accordingly reveals nothing about the prosecutor's true motives.

Third, defendant posits that the prosecutor's reasons for excusing Juror No. 23 are pretextual because he did not ask Juror No. 23 any questions. To be sure, a party's failure to ask a juror questions can be evidence of pretext when the party excuses the juror on a basis without eliciting information from that juror to justify the excusal on that basis. (*People v. Chaney* (1991) 234 Cal.App.3d 853, 860; *Davidson v. Harris* (8th Cir. 1994) 30 F.3d 963, 966; *U.S. v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420-421.) But where, as here, the information to justify the excusal is already part of the record through questioning by the court or the other party, the failure to ask additional questions is of no consequence. (*People v. Arellano* (2016) 245 Cal.App.4th 1139, 1163 (*Arellano*).)

Fourth, defendant argues that the prosecutor's reliance on Juror No. 23's age, parental and marital status and job choice is an invalid "proxy" for race. A party may not use a juror's residence as a proxy for race (e.g., *People v. Turner* (2001) 90 Cal.App.4th 413, 420; *United States v. Bishop* (1992) 959 F.2d

820, 825-826), but youth, life experience and career choice have yet to be deemed impermissible proxies. To the contrary, and as noted above, they are legitimate bases for peremptory challenges.

Lastly, defendant asserts that *Arellano*, *supra*, 245 Cal.App.4th 1139 dictates a ruling in his favor. It does not. In *Arellano*, the court invalidated the prosecutor's peremptory strike of an African-American juror after the prosecutor denied the juror was African-American and alternatively offered a reason for the strike that was unsupported by the record. (*Id.* at pp. 1165-1169.) Here, the prosecution acknowledged that Juror No. 23 was Hispanic and each of its reasons for excusing that juror were grounded in the record.

II. Instructional Error

Defendant introduced medical records documenting that, five days before the charged incident, he went to the emergency room and was treated for seven "puncture wounds," a laceration on his arm treated with one staple, and an "upper lip laceration" treated with a suture. Defendant had also told the officers he spoke to on the night of the stabbing that he had been recently stabbed, including in the arm. To the officers, however, defendant did not appear to be injured. On the basis of the medical records and his statements, defendant argues that the trial court erred in not (1) tailoring the standard CALCRIM 505 self-defense instruction to tell the jurors to consider what a "reasonable person" would believe in "the context of [defendant's] documented injuries" from five days earlier; and (2) giving jury instruction CALCRIM 3429 pertaining to persons with physical disabilities. We review these instructional errors de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

A. *Tailoring self-defense instruction*

The standard self-defense instruction, which was given in this case, states that the defense is only available if, among other things, the defendant "reasonably believed that he was in imminent danger of being killed or suffering great bodily injury" and that he "reasonably believed that the immediate use of deadly force was necessary to defend against that danger." (CALCRIM No. 505.) The instruction further explains that "[w]hen deciding whether [a] defendant's beliefs were reasonable," the jury should "consider all the circumstances as they were known to and appeared to the defendant and *consider what a reasonable person in a similar situation with similar knowledge would have believed*." (*Ibid.*, italics added.) Defendant asserts that the trial court should have added the phrase "in the context of defendant's documented injuries" to the italicized language to account for the evidence of his medical condition at the time of the charged crime.

Because defendant's proposed instruction "relates particular facts to a legal issue in the case," it is a pinpoint instruction. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215.) A trial court has no duty to give a pinpoint instruction until and unless the defendant requests one. (*People v. Wilkins* (2013) 56 Cal.4th 333, 348-349.) Defendant did not request one in this case, so the trial court did not err in declining to give this instruction.

Recognizing this deficiency, defendant argues that his trial counsel was constitutionally ineffective for not requesting the pinpoint instruction he now proposes on appeal. An attorney provides constitutionally ineffective assistance if (1) his representation is deficient, and (2) prejudice flows from that

deficient representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 692.)

Defendant has not satisfied either requirement necessary to a finding of ineffective assistance. His counsel was not deficient. Although jurors are to take into account a defendant's physical and mental afflictions in assessing what a reasonable person in his situation would believe (e.g., *People v. Smith* (1907) 151 Cal. 619, 627-628 [defendant's "enfeeble[ment] from disease"]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088-1089 [defendant's suffering from battered women's syndrome]), the standard jury instruction in this case allowed the jurors—and, indeed, required them—to do so when it referred to what "a reasonable person *in a similar situation* . . . would have believed." Defense counsel did not provide deficient performance by not requesting the pinpoint instruction defendant now proposes because that instruction highlights the defense evidence—and only the defense evidence—and is accordingly argumentative. (See *People v. Campos* (2007) 156 Cal.App.4th 1228, 1244 [instruction that """invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence""" is argumentative].) Courts are not to give argumentative pinpoint instructions. (*People v. Moon* (2005) 37 Cal.4th 1, 30, 32.) Any deficiency was also not prejudicial to defendant. Based on the standard instruction, defense counsel was able to forcefully argue during closing that defendant had been "cut up" "[a] week earlier," and defendant's injured state was relevant in assessing whether defendant "need[ed] to defend [him]self."

B. *CALCRIM 3429*

CALCRIM 3429 provides that "[a] person with a physical disability is required to (know what/use the amount of care that)

a reasonably careful person *with the same physical disability* would (know/use) in the same situation." (CALCRIM No. 3429, italics added.) This instruction is derived from *People v. Mathews* (1994) 25 Cal.App.4th 89, 94, 98-99, which held that a defendant's blindness, hearing impairment and confinement to a wheelchair were relevant to whether he "reasonably should [have] know[n]" that the people entering his house were police officers when the defendant was charged with exhibiting a firearm in the presence of a peace officer. The trial court did not err in not giving CALCRIM 3429 here because it is not relevant to this case. Self-defense does not turn on what the defendant "reasonably should [have] known" (in *Mathew's* language) or what a "reasonably careful person" . . . "is required to know" (in CALCRIM 3429's language) but rather on "the circumstances as they were known to and appeared to the defendant." These are distinct inquiries: The former deals with what knowledge should be attributed to the defendant, while the latter deals with the defendant's actual knowledge.

III. Sentencing Issue

On September 30, 2018, the Governor signed Senate Bill 1393, which amends section 1385 to eliminate the prohibition on dismissing prior "serious" felony conviction allegations under section 667, subd. (a). (§ 1385, subd. (b) (2018 ed.); Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2.) Because this new law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless the Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature has expressed no such intent in Senate Bill 1393. Because defendant's conviction is not final, he

is entitled to have the trial court exercise its newfound discretion whether to strike the prior "serious" felony allegations unless the court, during the original sentencing, "clearly indicated . . . that it would not . . . have stricken" those allegations if it had been aware of having the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, there is no such indication. The court made no express statements to that effect, and although the court selected a high-term base sentence, the court also stayed the personal use enhancement. On these facts, a remand is appropriate.

Petition for Habeas Corpus

In his separately filed petition for a writ of habeas corpus, defendant argues that his trial counsel was constitutionally ineffective for (1) not requesting the two jury instructions discussed above, (2) not conducting further investigation that would have uncovered more detailed medical records regarding his condition after the knife fight a few days before the charged incident as well as witnesses willing to testify about defendant's physical strength at the time of the charged crime and that the prior incident occurred in the same location as the charged crime, and (3) not introducing into evidence the additional records and testimony. The first argument lacks merit for the reasons discussed above. The remaining two arguments turn on defendant's ability to demonstrate that his counsel's failure to investigate and introduce the evidence was deficient and that, absent this deficient performance, there is a reasonable probability of a different outcome at trial. (*Strickland*, *supra*, 466 U.S. at 688, 692; *People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Even if we assume for the sake of argument that counsel's performance was deficient, it is not reasonably probable that the

introduction of the additional medical records and witnesses would have led to a different outcome. The jury already had in evidence defendant's statements that he had been recently injured as well as defendant's medical records detailing the specifics of his injuries. Further, defense counsel argued to the jury that this evidence should be considered in assessing whether defendant reasonably stabbed Wayne in self-defense. Defendant asserts that the jury may have viewed the medical records introduced into evidence as just a "strange blip" because no witness explained them to the jury, but *counsel* explained their significance to the jury. The additional medical records and witnesses are also in many respects cumulative of the evidence already before the jury. What is more, introduction of this further evidence may well have backfired by prompting the jury to view defendant's involvement in a violent altercation in the exact same strip mall just days before as proof—not of self-defense—but of his penchant for (or his provocation of) violence.

DISPOSITION

The judgment is affirmed, but the matter is remanded to the trial court to consider whether to exercise its discretion under Senate Bill 1393. The petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST